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12-19-2023
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STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT II

Case No. 2023AP1053 - CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

KEVIN A. TERRY,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT ENTERED IN FOND DU LAC
COUNTY CASE 2019CT434, THE HONORABLE JUDGE ENGLISH
PRESIDING.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

Law enforcement stopped Terry's vehicle without a reasonable basis to believe that he had committed a traffic violation. *State v. Brown*, 2014 WI 69, 355 Wis. 2d 668, 850 N.W.2d 66. Although his left taillamp was not in perfect working order, it was in good working order. Therefore, the officer violated Terry's constitutional right to be free from unreasonable seizures when he stopped his vehicle.

The parties agree on the legal standards applicable to this case. However, the dispute centers on how the law applies to the facts.

The State references Deputy Vis's observations after the traffic stop throughout their brief. Terry refutes any relevance to those facts and asks this Court to disregard them. Deputy Vis's observations of tape over the left taillight after the vehicle was stopped are irrelevant. Only the information available to the Deputy before he stopped the vehicle is relevant. *State v. Guzy*, 139 Wis. 2d 663, 679, 407 N.W.2d 548 (1987).

I. The trial court erroneously found that Terry's left taillight was emitting white light and not red light.

In the sixty seconds that the arresting officer was following Terry, he claims that he saw a white light coming from Terry's left rear brake light. The State argues that his testimony supports the trial court's factual finding(s). However, the officer's testimony does not support the factual finding and the video refutes the factual finding.

Deputy Vis testified that he observed what appeared to be "a white light coming from the upper portion" of the left taillight. While it is possible that the Deputy was able to see a small white light emitted from the upper portion of the left taillight, it was an insignificant quantity of white light. So insignificant that it was not visible on the video.

Furthermore, Deputy Vis contradicted himself in his testimony. He wavered between whether the light was red, pinkish, or just had a

small quantity of white light peeking out of the corner of the taillight. He admitted that any difference between the left and right taillight was difficult to see and was insignificant.

The Deputy's squad video does not reflect white light visible at all on Terry's left rear taillight. At one point, the Deputy's squad car is almost immediately behind Terry's so that there is virtually no distance between them, and yet, still, the white light is not visible.

From Deputy Vis's initial actions to follow Terry, when he was twenty to thirty yards behind Terry, and all the way up until the point that Terry is stopped, exhibit one shows that both left and right taillights were illuminated red, not white. (App. 110). The State argues that this Court cannot rely upon the video. Terry disagrees.

The State argues that this Court cannot rely upon the video of the traffic stop because this court cannot substitute its judgment of exhibit one over that of the trial court. Terry disagrees. The trial court was in no better position to examine exhibit one than this court is. Unlike testimony, the video plays the same for both courts.

The great weight of evidence is the evidence on the video, which is not directly refuted by the officer's testimony. At best, the officer's testimony is inconsistent and does not clearly refute anything seen on the video.

This Court can and should consider the video as evidence that demonstrates that the trial court's factual finding is clearly erroneous. Terry has demonstrated that the trial court's factual finding is "against the great weight and clear preponderance of the evidence." *Phelps v. Physicians Ins. Co.*, 2009 WI 74, ¶ 39, 319 Wis. 2d 1, 768 N.W.2d 615 (citing *State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis.2d 358, 752 N.W.2d 748; quoting *State v. Sykes*, 2005 WI 48, ¶ 21 n. 7, 279 Wis.2d 742, 695 N.W.2d 277). Not only is the video evidence concrete and clear, but the Deputy's testimony wavered.

II. Terry's constitutional right to be free from unlawful seizures was violated because the Deputy stopped his vehicle without any reasonable basis to believe that a moving traffic violation existed.

Terry's two rear taillights were both emanating a clear red signal to all vehicles behind him, as required by sec. 347.13(1), Wis. Stats. His taillights were in "good working order." *Brown*, 2014 WI 69. Therefore, the traffic stop was unlawful.

The Supreme Court held that "good working order" centers on "whether an object is functioning so as to fulfill its intended purpose." *Id.* at ¶ 29. The State completely side-steps that definition and ignores the standard set forth by the Supreme Court.

Instead, the State cites to sec. 347.07(2)(b), Wis. Stats., which states that the rear lamps shall illuminate red. Once again, the State ignores that the video shows that Terry's rear taillight was illuminated red.

Next, the State argues that the officer may have been able to see a small amount of white light coming from the crack when he was stopped behind Terry. However, sec. 347.08, Wis. Stats., was drafted to guide this Court and the trial court on how to measure the visibility of Terry's rear taillights.

Pursuant to sec. 347.09(1), the visibility of Terry's rear taillight and its red illumination should have been measured from the requisite distance (five hundred feet), at night. Therefore, the trial court's assessment of how the lamp looked while the officer's squad was directly behind it, shining its' own headlights onto the rear taillight, is not the proper assessment to determine the visibility and working order of the taillights.

Finally, the State argues that even if the officer was wrong in his legal opinion, that this Court should uphold the stop as a reasonable mistake in law. Terry urges this Court to reject the State's argument for two reasons.

First, the taillight was properly illuminated red, as required by secs. 347.13(1), 347.08(1), Wis. Stats., and by Brown. Terry has proven that his taillights were in good working order.

Second, *Brown* was decided nearly ten years ago. *Brown*, 2014 WI 69. Therefore, the officer's actions, even if mistaken, are not objectively reasonable. Under *Brown*, it is not reasonably objective to conclude that Terry's rear taillights were not in good working order.

Deputy Vis testified that there was only a slight difference between the color of the left and right rear taillight. (App. 10, 13, 22). In fact, Deputy Vis testified that it was hard to see the difference between the two.

Therefore, the Deputy admitted that the left rear taillight was emitting a red light sufficient to give notice and warning of braking to vehicles behind it on the roadway. His own testimony supports an objectively reasonable finding that the light was in good working order.

Good working order means that the taillight must emit a red light visible behind the vehicle during hours of darkness. Exhibit one shows that Terry's taillights complied with sec. 347.13(1), Wis. Stats. There is no credible evidence that Terry's taillight was not emitting a red light visible from five hundred feet behind his vehicle.

CONCLUSION

Terry's lights were in good working order. Therefore, the traffic stop was without proper cause and was unlawful. As such, all evidence stemming from the stop should be suppressed.

Signed and dated: December 19, 2023.

Respectfully submitted,

Electronically Signed by Erica L. Bauer

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 1,200 words.

Signed and dated: Tuesday, December 19, 2023.

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